Logan County Airport Contractors *and* International Union, United Mine Workers of America, AFL–CIO and United Mine Workers of America, District 17. Case 9–CA–27908

December 13, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 31, 1991, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Logan County Airport Contractors, Ethel, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends, inter alia, that the judge's conduct of the hearing and his findings are tainted with bias, hostility, and prejudice against the Respondent. We find these allegations to be without merit. On our full review of the record and the decision of the judge, we perceive no evidence that he prejudged the case, made prejudicial ruling, or demonstrated bias, hostility, and prejudice against the Respondent's counsel or its witness. We further find no evidence of partiality in the judge's analysis and discussion of the evidence or in his findings.

[2] While he is in agreement with the judge's reasoning that various complaint allegations are not barred by Sec. 10(b), Member Devaney notes that he dissented in *A & L Underground*, 302 NLRB 467 (1991), cited by the judge at sec. III,G,3, of his decision.

Deborah Grayson, Esq., for the General Counsel.
Charles L. Wood and *Edward W. Rugeley III, Esqs. (Spilman, Thomas, Battle & Klostermeyer)*, of Charleston, West Virginia, for the Respondent.
Charles F. Donnelly, Esq., of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Charleston, West Virginia, on May 2, 1991, on an original unfair labor practice charge filed on October 5, 1990, and a complaint issued on March 6, 1991, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally terminating its collective-bargaining agreement with the Charging Parties, and by discontinuing contributions to the UMWA Pension and Welfare Funds[1] and by refusing to arbitrate grievances.[2] In its duly filed answer, the Respondent denied that any unfair labor practices were committed, affirmatively alleging that the events in issue are time-barred by virtue of Section 10(b) of the Act, and that, in any event, an unlawful strike constituted a material breach of the agreement, thereby allowing the Respondent to terminate. Following close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.[3]

On the entire record,[4] including my opportunity directly to observe the witnesses while testifying and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an operating arm or trade name of Geupel Construction, Inc., an Ohio corporation, with a principal place of business in Columbus, Ohio. It is engaged in the mining of coal at a site in Ethel, West Virginia. In the course of that operation, the Respondent, during calendar year 1989, a representative period, purchased and received at its West Virginia facility goods and materials valued in excess of $50,000 directly from points located outside the State of West Virginia.

[1] The General Counsel's request to amend the complaint to include this allegation was granted at the hearing. In doing so, it was noted that this represented a nonsubstantive change, for, in cases involving abrogation of an entire agreement, reimbursement of fringe contributions is a part of the standard remedy. See, e.g., *Hawg-N-Action, Inc.*, 281 NLRB 56 (1986).

[2] The complaint, as written, included an allegation that the Respondent further violated Sec. 8(a)(5) by canceling medical insurance coverage for retirees. At the hearing, the General Counsel's request to delete this allegation was denied based on my erroneous recollection that, with respect to midterm modification of a collective-bargaining agreement, Sec. 8(d) fails to distinguish between mandatory and permissive subjects of bargaining. Although not disabused of that notion by any party, having, sua sponte, reexamined *Allied Chemical Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), it is clear that the Supreme Court has ruled otherwise. 404 U.S. at 185. Accordingly, having reconsidered the matter, the General Counsel's request is granted, and the allegation in questioned is dismissed as beyond the Board's remedial authority.

[3] A few days prior to issuance of this decision, the Respondent, pursuant to Sec. 102.37 of the Board's Rules and Regulations, moved that I disqualify myself from this proceeding. My reasons for denying this motion are set forth below under sec. IV.

[4] Certain errors in the transcript are noted and corrected.

On the foregoing, it is concluded that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the answer admits, and I find that the International Union, United Mine Workers of America, AFL–CIO, and United Mine Workers of America, District 17 (the Union) are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

This case relates to an alleged repudiation of the obligations incurred by the Respondent under the 1988 version of the National Bituminous Coal Wage Agreement (the Wage Agreement), a document which in large measure defines the employment terms of organized labor in the coal fields of West Virginia and elsewhere. In addition to outright rescission, the complaint charges the employer with repudiation of specific terms including: 1. Arbitration; 2. Contributions to benefit trust funds.

The Respondent defends on a number of grounds, both procedural and substantive. First, the Respondent asserts that it did not sign and, hence, was never bound to the 1988 Wage Agreement during times material to this proceeding. Alternatively, the Respondent argues that if it was, it was privileged to annul the agreement when the Union unlawfully struck its premises, conduct constituting a material breach of contract. Finally, the Respondent asserts that Section 10(b) bars all alleged unfair labor practices because the Union was aware that the Respondent had repudiated the agreement more than 6 months prior to the filing of any appropriate unfair labor practice charge.

B. *The Contractual History*

Between October 1986 and November 1990, the Respondent was engaged in the production of coal, using about 15 employees at a site in Logan County, West Virginia. In connection with that operation, on October 9, 1986, it executed the 1984 National Bituminous Coal Wage Agreement,[6] together with a memorandum of understanding exempting it from royalty payments until expiration on January 31, 1988.[7] On January 29, 1988, the Respondent executed an interim agreement, which protected it against strike action in the event that renewal of the Wage Agreement was not achieved prior to expiration of the 1984 contract. (G.C. Exh. 4.) In addition, the interim agreement included the following:

> The Employer and the Union agree to be bound by and comply fully with the terms and conditions of the agreement successor to the 1984 National Agreement negotiated between the United Mine Workers of America and the Bituminous Coal Operators Association (BCOA) as ratified by the UMWA membership (hereafter ''the Successor National Agreement'');
>
> Such Successor National Agreement will be promptly executed between the parties hereto following an affirmative ratification vote by the UMWA membership. Its terms and conditions will apply to all employees, mines and facilities which are covered by the 1984 National Agreement.

Ultimately an accord upon a successor agreement was reached, and, on February 1, 1988, the new National Agreement came into effect.[8] Although the Respondent contends otherwise, as shall be seen, until at least June 12, 1989, its terms were observed, with the Respondent continuing to check off dues, remitting them to the Union, while forwarding contributions to the Trust Fund that administers employee benefits in the area of health and retirement.[9]

Following the effective date of the 1988 Wage Agreement, the Respondent was reminded, from several sources, of its obligation to execute that document. The Respondent's director of human resources, Mark Potnick, testified that sometime in 1988, the International Union presented the Respondent the Wage Agreement the Respondent for signature.[10] Although required by the interim agreement to sign, the Respondent did not comply.

By letter of July 15, 1988, a representative of the United Mine Workers of America (UMWA) Health and Retirement Funds wrote the Respondent, acknowledging that the latter had forwarded contributions on behalf of its employees, but stating that it still had not received a signed copy of the Wage Agreement. The letter also stated that under Section 303 of the Act, it is unlawful for the Funds to ''accept payments . . . or award pension or benefit credit to employees of such employers for which payments are made, unless . . . the detailed basis on which such payments are to be made are specified in a written agreement with the employer.''[11] As shall be seen, the Respondent delayed more than a year in responding to that inquiry. During the interim, it continued to make payments to the Fund.[12]

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[5] The Respondent has admitted to the accuracy of the above data. The Board asserts jurisdiction based on commerce data derived from ''the most recent complete fiscal year preceding the unfair labor practices.'' *Reliable Roofing Co*., 246 NLRB 716 fn. 1 (1979). Pursuant to that authority, 1989 offers the appropriate source for the jurisdictional determination in this proceeding.

[6] G.C. Exhs. 2(a), (b), and (c).

[7] G.C. Exh. 3.

[8] G.C. Exh. 5. The Respondent's contention that the evidence fails to show ratification of that agreement is treated below.

[9] The Respondent denied that the unit set forth in the complaint was appropriate for collective bargaining. That deemed appropriate herein is the established unit defined in the Wage Agreements voluntarily executed by the Respondent in the past, excluding certain categories that, pursuant to agreement of the parties, did not pertain to the Respondent's operation. No evidence was presented tending to rebut the presumptive appropriateness of the historic, contractual bargaining unit. *Barrington Plaza*, 185 NLRB 962 fn. 5 (1970), enfd. in pertinent part 470 F.2d 669 (9th Cir. 1972).

[10] Apparently, District 17 did not take similar action. As I understand the testimony of Robert Phalan, the president of District 17, due to oversight on the part of its Subdistrict 3 in Logan, West Virginia, blank copies of the 1988 National Agreement were not forwarded to the Respondent for signature.

[11] R. Exh. 5.

[12] Sec. 302(a) of the Labor Management Relations Act also makes it unlawful for an employer to make such payments, unless ''the detailed basis on which such payments are to be made are specified in a *written agreement*.''

C. *The June/July 1989 Walkout and the Respondent's Reaction*

On or about June 13, 1989, ''stranger'' pickets appeared at the Respondent's premises. The latter's employees honored the picket lines and ceased working. The stoppage continued in support of ''memorial periods'' declared by the International Union between July 10–14, 1989. The employees failed to report for work for a total of some 20 days.

Employees were allowed to return to work, with none disciplined. The resumption of work was facilitated by the Respondent's notice, dated July 17, 1989, which by posting and direct delivery to the employees and their ''mine committee,'' advised as follows:

> You have reported for work and will be receiving wages and health benefits as before (beginning today and so long as you remain working), but please take notice that we believe the recent wildcat strike was a material breach of the Wage agreement by the UMWA. As a part of our proper legal remedies, we are seeking damages and a determination that a material breach of the Wage Agreement has occurred. We, therefore, are not waiving any of our legal rights and remedies by reason of your returning to work.[13]

By letter of that same date, the Respondent's attorney wrote identical letters to Robert Phalan, president of District 17, and Richard Trumka, the president of the UMWA, as follows:

> Logan County Airport Contractors considers the recent strikes by the UMWA and its members to be a material breach of its collective bargaining agreement with the UMWA. Accordingly, Logan County Airport Contractors will seek a declaratory judgement determination on this issue in the appropriate forum. While employees have returned to work, please take notice that such return to work does not constitute a waiver by Logan County Airport Contractors of its proper legal rights and remedies. While pursuing a court declaration, Logan County Airport Contractors will pay wages and health benefits to currently employed individuals in accordance with the 1988 Wage Agreement.[14]

At the time of the walkout, the Respondent had not executed the 1988 wage agreement—though in effect since February 1, 1988—nor had it acknowledged or answered the UMWA Trust Funds inquiry of July 15, 1988. On August 4, 1989, more than a year later, the Respondent, through its attorney, replied to the Fund's letter, stating, in material part, as follows:

> Please be advised that Logan County Airport Contractors has not signed a Wage Agreement with the UMWA. Further, Logan County Airport Contractors has determined that the recent illegal strike in District 17 and memorial period called without proper notice constitute a material breach of any agreement (oral or written) by and between Logan County Airport Contractors and the UMWA. Logan County Airport Contractors is currently seeking a legal declaration that there is no agreement between the parties.
>
> Until the court determines whether a material breach has occurred, Logan County Airport Contractors will execute no labor agreements and will escrow contributions to the Funds at the rate specified in the National Bituminous wage Coal Agreement of 1988. Logan County Airport Contractors hereby offers to make the UMWA Health and Retirement Funds the escrow agent upon execution of an appropriate escrow agreement. If this is unacceptable to the Funds, please contact me, and I will make other arrangements for the escrow. While Logan County Airport Contractors will continue to file the reports of hours for pension credit with the Funds with the statement that funds will be withheld, such filing should not be considered as acquiescence by Logan County Airport Contractors of a material breach by the UMWA. (R. Exh. 6.)

D. *The Litigation; the November Meetings; and the Withdrawal Memo*

On October 3, 1989, the UMWA Benefit Fund instituted an action in the U.S. District Court against the Respondent for recovery of health and pension contributions, dating essentially from July 1, 1989. As a counter to this action, the Respondent filed a third-party complaint, pursuant to Sections 301 and 303 of the National Labor Relations Act, which inter alia, sought relief as follows:

> [a] declaratory judgment declaring the rights and other legal relations of the . . . plaintiffs under the terms of the 1987 Interim Agreement and that the 1988 Agreement be terminated by reason of . . . defendants' material breaches. (G.C. Exh. 7.)

In support of that request, the third party complaint included the following averments:

> 3. Third-party plaintiffs did not execute the 1988 Agreement but did comply with all terms and conditions of the 1988 Agreement executed by the BCOA and the UMWA International on February 1, 1988, until the incidences set forth herein.
>
> 28. Third-party plaintiffs contend there is no valid agreement between the parties and refuses to recognize the existence of obligations arising out of the 1987 Interim Agreement and the 1988 Agreement after June 13, 1989, by reason of third-party defendants' material breach of the 1987 Interim Agreement and 1988 Agreement.

In that same timeframe, the Respondent was negotiating mining rights at Ridge Creek in Logan County, an area referred to as the Belva properties. Accordingly, at its request, on November 9, 1989, a meeting was held at District 17 headquarters in Charleston, West Virginia, because the Respondent wished to discuss the possibility of mining that site, with an eye toward obtaining union assent to that venture. The Respondent was represented by Mark Potnick, Fred Lawson, and Jimmy Singleton. The meeting concluded with the understanding that Phalan would contact Potnick on Wednesday, November 15.

[13] R. Exh. 4.

[14] G.C. Exh. 6 and R. Exh. 7.

Shortly thereafter, Phalan was served with the papers impleading District 17 as third-party defendant in the above lawsuit. He claims that he was infuriated, since the principals had just discussed their relationship in positive terms. He did not call Potnick as promised, but on Wednesday, Potnick called him. Phalan advised the latter that he would not discuss the Belva properties until the lawsuit were resolved. Potnick struck Phalan as surprised. Indeed, Potnick avers that, at the time, he was unaware of the third-party court suit against District 17. According to Phalan, Potnick requested time to explore the matter, indicating he would call back the next day. He did so, expressing a belief that the matter could be worked out. Phalan indicated he would not talk with Potnick until the lawsuit were resolved.

On November 17, 1989, Potnick, Lawson, and Singleton again appeared at District 17 headquarters. Before discussing the Belva properties, Phalan insisted that all three sign a document, agreeing ''to immediately withdraw or cause to be withdrawn, with prejudice, the lawsuit now pending in the U.S. District Court for the District of Columbia.'' (G.C. Exh. 8.) They obliged.

Phalan testified that to his knowledge the lawsuit was dismissed against District 17. There is no evidence to the contrary. Potnick was unaware that any further lawsuit had been filed contesting its obligation to comply with the Wage Agreement. However, the ''material breach'' was raised as a defense to the lawsuit by the Fund, and, as represented by counsel, a second lawsuit on behalf of the retirees.[15]

E. *The Changes in Benefits*

The complaint alleges that the Respondent violated Section 8(a)(5) not only by its ultimate abrogation of the Wage Agreement, but also by its unilateral termination of certain benefits. There is no dispute that the Respondent discontinued contributions to the benefit fund and terminated arbitration. The following colloquy between the Respondent's counsel and Potnick, is indicative of what occurred:

> Mr. Woody: [O]nce Logan County made the decision that there had been a unilateral breach by the Union, what . . . did Logan County do with respect to terms of employment with its employees?
>
> Mr. Potnick: Well, certain terms, in accordance with our the *contract no longer existed* was breached and then rescinded, certain items changed. One of these items of course, would be contribution to the funds; another one of those items would be retirement, health benefits for . . . pensioners that came along. Another item was . . . . arbitration.

The specific changes were not announced in advance or communicated to employees generally. Potnick, who was familiar with the UMWA's ''no contract, no work'' policy, acknowledged that, as the case presented itself, the Company would implement its position.

Moreover, as shall be seen, until the ''late Spring or Summer of 1990,'' there was no precise communication to the Union suggesting that the Respondent would not, or had not, abided by all terms of the Wage Agreement. To that point in time, with the exception of the plan to escrow retirement and health contributions, an intention disclosed solely to the UMWA Health and Pension Funds, there apparently was not a single noncompliance with any obligation imposed by that contract.

During that period, however, Phalan received reports that pensioners formerly employed by the Respondent did not have medical insurance coverage. Mike Browning, the vice president of District 17, testified that in the spring/summer of 1990 he was detailed to the Logan, West Virginia Subdistrict office. He relates that in late May or early June, J. T. Caldwell, one of the Respondent's pensioners, appeared at that office to complain that the Respondent had terminated his medical benefits. Browning contacted Potnick, who confirmed that this was the case.

By letter dated June 8, 1990, Browning protested this change, while warning that unilateral curtailment of ''any area'' of the National Agreement would be unlawful. The letter included the following request:

> I am requesting that you provide me with information on any modifications that you have made to the contract which was signed by you. Such information is needed by the union to determine what type of legal action we should take in order to restore the benefits that are due our members.[16]

This letter would produce the first clear and unambiguous declaration that the Respondent had terminated the Wage Agreement. Thus, by letter of June 18, 1990, the Respondent replied through its attorney, indicating that documents previously furnished the Union ''informed the Union of the termination of the wage agreement and the action planned by Logan County,'' going on to describe the notice posted on July 17, 1989, quoted above, as stating that ''as a result of the material breach, the agreement was terminated.'' Finally, the letter states that the trust funds on August 4, 1989, were notified that ''Logan County was no longer bound by the obligations arising from the 1988 wage agreement.''[17] On July 23, 1990, the Union filed unfair labor practice charges in Case 9–CA–27710 setting forth that the Respondent since about May 31, 1990, had unilaterally ''modified'' the contract.[18] Browning testified that this was based upon the cancelation of health benefits for pensioners. The charge was withdrawn on September 11, 1990.[19]

In the meantime, on August 6, 1990, a third-step grievance meeting was held. According to David Evans, a union field representative, a deadlock resulted on one of the grievances. Arbitration was initially scheduled, by mutual assent, for mid-September. It would be postponed because of a conflict with the International convention. Later in early October, when the Union sought to reschedule the arbitration, the Respondent, by letter dated October 2, 1990, replied:

[15] The Respondent's filings in those actions are not a matter of record, and hence the precise position expressed is not discernible on this record.

[16] G.C. Exh. 11.

[17] G.C. Exh. 12. The plan to escrow contributions at best from the Respondent's point of view, presented an ambiguity. That step was not inconsistent with the ongoing viability of the Wage Agreement. It merely constituted an ancillary hedge against the possibility that judicial approval of rescission might not be forthcoming.

[18] R. Exh. 1.

[19] R. Exh. 2.

> Logan County Airport is not signatory to the 1988 Agreement, and furthermore took a legal position in 1989 known to the Union and its employees that the strike occurring in 1989 was a material breach of the agreement. . . . Therefore, the Employer has met its obligations of processing this grievance through Step 3, but is not agreeable or obligated to arbitrate this dispute.[20]

On October 5, 1990, the Union filed the initial unfair labor practice charge giving rise to the instant complaint (Case 9–CA–27908) which was founded on the Company's refusal to process a grievance.

F. *The Meetings of October 18 and November 1, 1990*

In the meantime, during the fall of 1990, the Respondent was investigating an additional site for mining potential (the Laredo properties). Again desirous of union approval, Potnick called Phalan, and arranged a meeting for October 18.

Because of a death in his family, Phalan did not attend. The Union was represented by Michael Browning and Don Riley. Potnick, Lawson, and Singleton were present for the Respondent. Browning testified that he took this opportunity to chastise management for cutting off the pensioners. Potnick advised that there was no agreement in place, a position described by Potnick as taken on advice of counsel. In addition to discussing the Laredo properties, according to Potnick, the Company sought to renegotiate certain terms of the 1988 Wage Agreement.

That evening, Browning advised Phalan that the Respondent had insisted that no contract was in place. According to Browning, Phalan was ''livid.''

On November 1, 1990, the Union amended the original charge in this proceeding, setting forth for the first time that the Respondent had ''abrogated'' the Wage Agreement.

Another meeting was held at District 17 headquarters on November 16, 1990. Potnick, Lawson, and Singleton again attended on behalf of the Respondent. David Evans, a subdistrict field representative, accompanied Phalan. Phalan told Potnick that three items had to be resolved before the Union would discuss the Laredo properties: (1) The assertion that no contract was in place, (2) the refusal to arbitrate and honor grievances, and (3) the withdrawal of medical benefits for retirees. According to Phalan, Potnick indicated that he thought those issues could be resolved. The latter observed that the National Agreement never had been signed and that the Respondent would maintain its legal position concerning the breach, but that they were willing to sign the agreements retroactive to February 1, 1988, to reestablish medical coverage for retirees, and honor the grievance procedure. The Respondent then requested an exemption from contributions into the 1950 benefit plan and trust. Phalan stated that this was impossible as the Respondent was already bound to the 1988 National Agreement.

[20] G.C. Exh. 15.

G. *Concluding Analysis*

1. The Respondent's contractual obligation

The General Counsel has established that the Respondent executed the 1987 interim agreement. Having done so, the Respondent, in exchange for limited no-strike protection, incurred the obligation ''to be bound by and comply fully with the terms and conditions of the agreement successor to the 1984 National Agreement.''

The Respondent contests this obligation upon several grounds. For example, the 1988 wage agreement provided that the accord was ''to become effective only upon the condition that it is ratified and approved by the membership'' (G.C. Exh. 5, p. 238.) On this basis, the Respondent contends that ''The General Counsel did not establish whether the Union ratified the 1988 NBCWA as a required contingency for the effectiveness of that document.'' The record amply demonstrates that this was the case. The 1988 Wage Agreement was identified by Phalan as the replacement for the 1984 Wage Agreement, and was described by him as ''the successor national agreement.'' Phalan was in a position to know just what the membership approved, and his testimony, some 3 years after the fact, subsumed and is broad enough to provide implicit assurance that the replacement agreement, in fact, was ratified in 1988.

Next, it is argued that the General Counsel failed to establish that the Respondent ever actually applied the terms of the 1988 Wage Agreement. In this respect, the Respondent appears to misapprehend the General Counsel's burden. Thus, the violations in question are substantiated, prima facie, simply upon a showing that the Respondent was bound to the 1988 Wage Agreement, and that at the times specified, the Respondent, without the Union's assent, discontinued contributions to the fund and arbitration, and, then, abrogated the entire agreement.[21]

As shall be seen below, contrary to the Respondent's premise, the record unmistakably substantiates that the Respondent complied with all terms of the 1988 wage agreement until July 1989, and, at a minimum, subsequently used that agreement as a guide as to all employment terms except contributions to the health and retirement funds, health coverage for retirees, and arbitration.[22] Accordingly, the General Counsel has established that the Respondent since February 1, 1988, and, *presumptively*, at all times thereafter, was obligated to adhere to all terms of the 1988 wage Agreement, and that its commitment to do so was cognizable under section 8(d) of the Act.

[21] Any earlier noncompliances, while not entirely irrelevant, are alien to the General Counsel's case. For, they might well furnish a foundation for a 10(b) defense. In other words, if the Respondent had not implemented the 1988 Wage Agreement, and that fact was communicated to the Union more than 6 months prior to the filing of an unfair labor practice charge, the instant complaint would be flawed insofar as it alleges violations incidental to the time-barred event. However, the burden of showing this initial noncompliance, together with notification, would fall upon the Respondent, not the General Counsel. *A & L Underground*, 302 NLRB 467 (1991).

[22] In fact, the Respondent continued to remit dues pursuant to check off through December 1990. G.C. Exhs. 9 and 10.

2. The material breach

On the merits, the Respondent would rebut this presumption on a claim that the stoppages in June and July 1989 constituted a material breach of contract, thus, nullifying any obligation incurred under the 1988 Wage Agreement. However, no provision is cited as having been compromised by these work stoppages.[23]

The Respondent's position also appears to be founded on a claim that the walkout was illegal. Here again the contention rests upon rhetoric, not proof. In this proceeding, the circumstances surrounding the stoppages, including the sponsors of the pickets, and nature of any unlawfulness were defined in the most cursory sense, and except, in passing, were not addressed. Moreover, to my knowledge, there never has been a determination, in any forum, that the 1989 picketing and stoppages in the coal industry, unless contemptuous of a court order, were unlawful. The 10(l) injunction issued by the United States District Court for the Southern District of West Virginia did not resolve that it merely was founded on ''reasonable cause to believe'' that violations occurred.[24] The settlement approved by the Board in International Union, *Mine Workers (Island Creek Coal)*, 302 NLRB 949 (1991), contained a nonadmissions clause.

The remedial scheme accessible to employers who are confronted with unlawful strikes and picketing is well defined in the Act. In June 1989, hundreds of unfair labor practice charges were filed against the UMWA based upon allegedly unlawful strikes and picketing. The Respondent does not claim, and there is no evidence that it was part of this class. Insofar as this record discloses, it has yet to litigate, in any forum, that the walkout in question was illegal.

3. The 10(b) defense

The Respondent's sole witness, Human Resources Director Potnick, testified that the 1988 Wage Agreement was rescinded when employees returned to work in mid-July 1989. A dispute exists as to when this was communicated to the Union, with the General Counsel contending that notification was not made until June 1990, and the Respondent, arguing that this was effected through notices and letters dating back to July 1989, and verbally communicated to District 17 in November 1989.

In *A & L Underground*, 302 NLRB 467 (1991), the Board renounced the ''continuing violation theory,''[25] stating:

> We find that the policies underlying Section 10(b) are best effectuated by requiring a party, in order to avoid the time-bar, to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation. [Id. at 468.]

Thus, the burden of proving a clearly communicated contract modification is on the Respondent. Such an unfair labor practice charge will not be time-barred if the ''delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party.'' The breach, and its communication must be total, rather than ''an accumulation of breaches.'' Id. at 468. Thus, the question turns on the precise time that the Union was provided *unmistakable* notification of all elements required to support a violation. *Farmingdale Iron Works*, 249 NLRB 98 (1980).

First, in agreement with the General Counsel, failure to sign the 1988 Wage Agreement following its effective date failed to substantiate a Section 10(b) defense. Unquestionably, the Union would have learned in November 1989 from the third-party law suit that the Company had not signed and was contending that it was not obligated to observe the Wage Agreement. Apparently, for this reason, the Respondent in its posthearing brief states, ''The ambiguity of the situation should have been remedied by the Union in 1989.'' I agree that the Respondent's legal action created an ''ambiguity,'' which fell short of communicating that it would never sign or that it actually had repudiated the Wage Agreement. Posturing was not enough. A guess does not create an unfair labor practice case. A contention that one is not obligated is something less than repudiation by self help. The Respondent's allegations in the third-party complaint did not dispel the interpretation that abrogation was a step that the Respondent intended to take only in the safety of court approval.

Moreover in applying Section 10(b) on this record, the critical focus is abrogation, not the failure to execute. In practical terms, execution was not an essential element of commitment. Potnick agreed that this omission is a familiar practice in this industry. Though compellable through suit for specific performance, it is a nonsubstantive offense, whose ambivalence will always be heightened, where, as here, the employer's exposed position reflects continued application of the contract. Where each and every term is honored, the union, until provided unambiguous notice of an intent never to sign,[26] is in no position, and has no reason to, evaluate

[23] Cf. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, 1180–1181 (1953). The theories contained in the since withdrawn third party complaint have not been advanced in support of the Respondent's position in this case. In any event, the 1988 Wage Agreement does not contain a no-strike clause. And the Respondent has failed to offer facts warranting an inference that such a limitation was contemplated. See, e.g., *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974); *U.S. Steel Corp. v. Mine Workers*, 548 F.2d 67 (3d Cir. 1976); *Carbon Fuel Co. v. Mine Workers*, 582 F.2d 1346 (4th Cir. 1978). The interim agreement offered such protection on the limited and expired condition described below:

> In the event the Union authorizes a strike against the BCOA or any of its members upon the termination of the 1984 National Agreement, the Union will *not* call such strike against the Employer. This pledge is made in return for this Employer's promise to make the retroactive payments described in paragraph 4(b) above and its agreement not to lockout any classified employees.

[24] R. Exh. 2.

[25] By virtue of that concept, Sec. 10(b) would not bar the Board from finding an 8(d) violation where no charge had been filed for more than 6 months after a clear repudiation of a contract. The appropriate remedy, however, would afford no redress for breaches prior to the 10(b) cutoff date. See *Al Bryant, Inc.*, 260 NLRB 128, 135 (1982).

[26] Under the interim agreement, the duty to execute the Wage Agreement merely was one of two, distinct and entirely severable provisions. Pursuant to each, the Respondent agreed to a distinct obligation. The renege on the obligation to sign, under no construction of ordinary contract principles, would privilege the Respondent to escape the duty to apply the terms and conditions of the 1988 Agreement. Breach of this latter obligation would neither give rise to a case or controversy nor commence running of the 8(b) period until

Continued

whether the employer considers itself bound. In other words, where it is unclear that there has been an actionable wrong, and surface indications suggest the contrary, the union is not obligated to commit time and resources to litigation. Thus, Section 10(b) remains dormant at that juncture.[27]

The Respondent denies, however, that this could have been a cause for uncertainty in this case. In support, it argues that the 1988 Wage Agreement had been breached from its inception, and that at no time after February 1, 1988, did it ever honor the terms of that contract. The Respondent's position in this respect is founded upon a misapprehension of the record, which is anchored by an oft-repeated misrepresentation in its posthearing brief that ''Mr. Potnick testified that the 1984 NBCWA was the guide.'' In fact, the latter did not use the term ''1984'' in describing the agreement in effect at any time relevant to this proceeding.[28] On the contrary, his testimony was consistent with correspondence signed by the Respondent's attorney, including an above-cited averment in the third-party complaint,[29] which plainly stated that the terms of the 1988 Wage Agreement remained effective, at least until the 1989 walkout.[30] Potnick on cross-examination by the General Counsel specifically testified that this was the case:

> Ms. Grayson: So the terms of the 1988 wage agreement were in effect . . . from January, 1988 through July, 1989?
>
> Mr. Potnick: [A]s far as the contributions, they were made. We had not signed the '88 agreement. We [were] working under the interim agreement.
>
> Q. But you continued . . . the terms of the '88 agreement during the period of time prior to the strike?
>
> A. The contributions were made, yes.[31]
>
> Q. What about the other terms and conditions? They were also in effect, were they not—the wages and—
>
> A. Yes.

Moreover, there can be no doubt that the 1988 Wage Agreement was the source of employment terms after July 1989 and that this, not any 1984 agreement was the ''guide'' referenced in Potnick's testimony. Thus, employees on their return to work were informed by the Respondent as follows:

> You have reported for work and will be receiving wages and health benefits as before (beginning today and so long as you remain working).

Thus, consistent with the information provided by the Respondent's counsel to the Union, the Fund and the U.S. District Court, as well as Potnick's testimony, a uniform body of evidence demonstrates that there was no failure to honor the terms of the 1988 Wage Agreement prior to July 1989. Accordingly, nothing occurred earlier that would bar this proceeding under Section 10(b) of the Act.

As for events occurring after that date, the Respondent's written communications did not meet the statutory requirements for effective notification. Potnick testified that he intended to disclose that the contract was no longer in place, and believed that this was accomplished through the July 17, 1989 postings and contemporaneous publication to the employees and the Union.[32] However, despite his testimony and characterizations by the Respondent's attorney, neither these documents nor letters signed by the latter substantiate that the Respondent, outside the 10(b) cutoff date, informed any union functionary that any of specific changes would be made or that ''the *contract no longer existed*.''

The only documented avowal that the contract had been rescinded appears in the letter written by the Respondent's attorney on June 18, 1990. Attorney Woody took the liberty to then declare that documents previously furnished the Union ''informed the Union of the termination of the wage agreement and the action planned by Logan County,'' going on to describe the notice posted on July 17, 1989, as stating that ''as a result of the material breach, the agreement was terminated.'' Finally, the letter states that the Trust funds on August 4, 1989, were notified that ''Logan County was no longer bound by the obligations arising from the 1988 wage agreement.''[33]

In contrast, however, all earlier writings omit mention that the contract had been rescinded, abrogated, or that it no longer was in place. In each instance, the Respondent stopped with the announcement that it would seek judicial approval of its position on ''material breach.'' The language of abrogation iterated and reiterated in Attorney Woody's letter of June 18, 1990, was no where evident. This document

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the Union were informed of the noncompliance in clear and undeniable terms.

[27] The Respondent cites *Hoover Enterprises*, 293 NLRB 654 (1989), which repudiated the continuing violation theory in cases where an employer refuses to sign and implement an agreement reached. In accord: *A & L Underground*, supra. In *Hoover*, the union had been notified in writing, and there was no question that, beyond the 10(b) period, it was on notice as to the full scope of the unfair labor practices involved.

[28] At several points, Potnick used the term ''prior'' to describe the contract that was used as a ''guide'' after the ''material breach.'' For example, Potnick related that, based upon the position that there had been a material breach, certain items were changed, but '' the prior contract served as a wonderful guide to continue under certain terms that predated the breach and we had to continue production and we had to continue those terms.''

[29] The pleading signed by Attorney Woody states:

> 13. Third-party plaintiffs did not execute the 1988 Agreement but did comply with all terms and conditions of the 1988 Agreement executed by BCOA and the UMWA International on February 1, 1988, until the incidences set forth herein. [G.C. Exh. 7.]

[30] In his letter of June 18, 1990, Attorney Woody stated: ''as a result of the material breach, the agreement was terminated.'' His letter to the Fund, of August 4, 1989, states that the Employer ''will escrow contributions to the Funds at the rate specified in the National Bituminous Coal Wage Agreement of 1988.''

[31] This colloquy is difficult to reconcile with the statement in the Respondent's brief that ''The General Counsel did not establish whether or not Logan County made contributions to the 1950 Pension Fund after January, 1988 (termination date of the 1984 NBCWA).''

[32] Potnick, who was familiar with the UMWA's ''no contract, no work'' policy, agreed that these documents lacked specific language stating that the contract was not in place.

[33] G.C. Exh. 12. This attempt to edit past writings on an after-the-fact basis was plainly self serving. It bears kinship to Potnick's expressed belief that the documented position of the Respondent, in the form of postings to employees and letters from its attorney ''to Union officials, including [the] International,'' conveyed that the contract since July 17, 1989, had been rescinded. Whether these were honestly held interpretations or a contrived argumentation in response to the complaint need not be resolved. The documents speak for themselves.

capped a history of correspondence in which the language selected was hedged, and too vague to even be construed as an anticipatory breach of contract. The message delivered to the Union and the employees was perfectly consistent with an intention to live up to the terms of the Wage Agreement, continuously, until a court of law lifted that obligation. Accordingly, prior to June 1990, notifications to the Union merely conveyed that the Respondent *might*, at some time in the future, if a court approves, rescind the contract; they did not communicate that any actionable unfair labor practice had occurred.[34]

The only remaining basis for application of Section 10(b) is Potnick's claim that, on a verbal basis, in November 1989, he presented a clear picture to the Union. Potnick was not a trustworthy witness. Thus, when asked as to whether the ''fact'' that the contract was not in place was communicated to the employees, Potnick replied, ''I interpreted that it was I felt that it was.'' When admonished by me that his interpretation was a nonprobative response, Potnick removed any qualification, stating: ''We did convey to them that the contract was not in place.'' No effort was made by the Respondent's counsel to define who told them and how. On cross-examination, however, Potnick conceded that he did not witness any verbal communications with employees, as he was based in Columbus, Ohio. Instead, he testified that Mine Superintendent Fred Miller was instructed as to what to tell the employees. He states that the instructions to Miller were consistent with the notices that were posted and distributed, but that Miller also was told to advise the workers that ''there was no contract in place.''[35]

Even less believable was Potnick's testimony that District 17 was orally informed of actual rescission on November 17, 1989. It will be recalled that a meeting was held on that date at District 17 headquarters, as a followup to Respondent's attempts to obtain union assent to a mining venture. At that time, three of Respondent's agents, including Potnick, executed an agreement to withdraw the third-party lawsuit pending in the U.S. District Court for the District of Columbia against District 17. Potnick insists that, in this context, the outraged Phalan was informed as follows:

> I can't recall the exact words, but I recall that we discussed our position that because of the strike, because of the extent of the strike and the nature of the strike, we considered that to be a breach of contract by the Union and *that we had taken the position that the contract was rescinded* and, as a result of that, we discontinued making contributions to the Funds. The Funds filed action against the Company, and, in response, the Company named the District [17] as a Third Party Defendant in the matter, and that's what he had received. And since we were in negotiations for new operations and he was quite upset about it at that time, we agreed to dismiss Mr. Phalan of the District as a Third Party defendant in the matter. And that's all we discussed at that time. We didn't discuss it in any further detail after he was withdrawn and we went into our discussions for the new operation.

Phalan denied that Potnick told him that the contract had been rescinded. He also denied that Potnick, in executing the withdrawal, stated that this did not mean that the Company had changed its position. Phalan was, by far, the more believable witness and in this instance his version was the more probable.

Thus, any such statement on Potnick's part would have marked a change in form. The Respondent was not averse to stating its position in writing. Yet, as of November 17, 1989, even with the assistance of legal counsel, it apparently was unable to find the words that would communicate in unqualified terms that the Wage Agreement had been terminated. This meeting would not offer the setting for a clearer approach. Potnick admits Phalan's angry reaction to the lawsuit, and does not deny that he would not even discuss other issues until the Respondent backed off. The sensitivity of the issue was illustrated to the management team through the withdrawal memorandum, drafted in anticipation of their arrival. They also knew that the meeting could only proceed if they executed that document. Obviously, Phalan's pique was not evoked by the lawsuit as an abstraction; only its utility as a first step towards contract nullification. Having executed the release as the quid pro quo for union cooperation on the Belva venture, the Respondent knew better than to rob that concession of all meaning by telling Phalan that the Respondent had used self-help, and abrogated the contract, rather than await judicial assent as communicated in its letters and notices.[36]

The testimony of Potnick that he at any time verbally communicated either that the contract had been rescinded or that the Respondent would not sign was not believed and is discredited. There is no probative evidence that anyone else personally notified union representatives that Respondent was of such a mind. Moreover, as contended by the General Counsel, the Union, upon execution of the withdrawal memorandum on November 17, 1989, at a minimum, was given reasonable basis for belief that the Respondent had abandoned any position that the contract was not in place.

In this case, Section 10(b) would bar any unfair labor practice occurring prior to April 5, 1990. In agreement with the General Counsel, I find that a letter to Mark Browning,

[34] It will be recalled that Attorney Logan's letter to the Funds dated August 4, 1989, stated, ''Until the court determines whether a material breach has occurred, Logan County Airport Contractors will execute no labor agreements.'' R. Exh. 6.

[35] The Respondent proffered a list of written instructions which Miller was expected to follow in reinstating the workers. The list is devoid of any such reference. R. Exh. 3. Miller did not testify. Potnick's testimony on direct was misleading; he obviously could not vouch for what Miller had advised the men. As a whole, his testimony, in critical areas, seemed to lack logical consistency. In this instance, considering the highly volatile response that might be expected from a display of candor, it is only sensible that any disclosure strategy on recision would have been identical to that followed in communicating the cancellation of retirees' insurance and the termination of arbitration; namely, wait till absolutely necessary.

[36] The Respondent argues that the agreement to withdraw the lawsuit was ineffectual as it did not specifically mention ''material breach'' or ''recision.'' Apparently, the Respondent would hold the Union to a higher standard of particularity than it was willing to follow. In any event, in the face of the Respondent's declared position, this was not necessary. As indicated, the Company had simply stated that it would initiate action in a court to declare the strike a material breach of contract. By virtue of the agreement executed by the Respondent on November 17, 1989, the Union could rightfully assume that the threat to the contract had been removed.

over the signature of Attorney Woody, dated June 18, 1990, marked the first occasion on which the Union clearly was advised of the Respondent's position that ''the agreement was terminated.'' (G.C. Exh. 12.) This also afforded the first clear indication that the Respondent would never sign. The notification was well within the 10(b) period, pursuant to either the original charge filed on October 5, 1990, or the amendment thereto of November 1, 1990.

As for the partial modifications, insofar as this record discloses, the Union had not at any time prior to June 18, 1990, been informed that the Respondent had suspended direct contributions to the UMWA Health and Retirement Funds. The Funds were notified that this would be the case by the Respondent's letter of August 4, 1989. No similar message was conveyed to the Union. As the letter sent by the *Funds* on July 15, 1988, signifies that a copy was forwarded to Phalan, the Respondent's attorney neglected to follow suit; no copy of its reply was sent to the Union.[37]

Under established Board policy, notification to trust administrators does not alone suffice as notice to a union for purposes of of the Act. The law recognizes that labor organizations and employers are not on any per se basis presumed to be affiliated with multiemployer benefit funds, or to be anything but separate and distinct entities. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). ''[T]he fact that the interests of the administrator . . . harmonize with or parallel those of the trust settlors does not in itself give rise to an agency relationship between them.'' *Operating Engineers Local 12 (Griffith Co.)*, 243 NLRB 1121, 1125 (1979), affd. 660 F.2d 406, 411 (9th Cir. 1981). The affairs of the fund will be binding on a union only on a specific showing of agency responsibility. *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929, 931 (1984). Here, there was no evidence offering any reasonable basis for concluding that the Funds' knowledge was imputable to the Union. Accordingly, consistent with the position of the General Counsel, it is concluded that the record fails to demonstrate that the Union had knowledge of the content of the Respondent's letter of August 4, 1989, at any time before April 5, 1990, the cutoff date under the governing unfair labor practice charge in this case.

With respect to the annulment of arbitration, that fact was not confirmed to the Union until the Respondent's letter of October 2, 1990, an event which obviously prompted the initial charge in this proceeding filed only a few days later.

For the above reasons, and as effective notification of the termination of arbitration, the discontinuance of fringe benefit contributions, and the recission of the collective-bargaining agreement did not occur until 6 months prior to the filing of the instant unfair labor practice charges, Section 10(b) is no bar. Accordingly, as the Respondent has failed to substantiate a material breach which would privilege cancellation of the contract, these modifications of the obligations incurred under the interim agreement violated Section 8(a)(5) and (1) of the Act.

[37] In this connection, the Respondent's posthearing brief states that such a copy was forwarded to Phalan. This is based on misreading of Potnick's testimony. The error is aggravated by several factors. First, it is somewhat material, since it was the first occasion in which the Respondent, in writing, declared that the Wage Agreement had not been signed. Second, the representation appears in a posthearing brief signed by the same attorney that wrote the letter, and, who, consequently, should have known that no copy was forwarded to District 17. Finally, the characterization of Potnick's testimony was not only inconsistent with a stipulation of fact entered by that same attorney, but with earlier testimony on Potnick's part that, as far as he knew, there were no copies to the Union.

IV. THE MOTION TO DISQUALIFY

As indicated, a motion to disqualify, dated July 23, 1991, was filed by Charles L. Woody, who was the Respondent's attorney during all stages of the proceeding, including events giving rise to the underlying unfair labor practice charges. By affidavit, Attorney Woody avers that I exhibited bias against himself; Mark Potnick, the Respondent's sole witness; as well as the Respondent's position in the case. The accusations and insinuations in that document are totally lacking in merit.

The allegation concerning Potnick is predicated on his cross-examination by me following his testimony that (1) the Wage Agreement was not in place after a work stoppage ended on July 17, 1989, (2) that employees at that time were told that this was the case, and (3) that employees were told on their return that ''certain terms would be different.'' This testimony was highly material, if not determinative under the Respondent's 10(b) defense. When rendered, it was suspect under several counts. First, these points were omitted from written communications, designed to express the Respondent's position, which were delivered within the same timeframe to the employees[38] and to the Union.[39] Second, an incongruity was posed by Potnick's testimony that retirees were not told in advance that the Respondent would cancel its agreement to maintain their health insurance coverage. Potnick would have had me believe that Respondent, while intent on maintaining operations, would expose itself to the risk entailed under the Union's ''no contract, no work policy,'' by actually stating that no contract was in place, yet, in doing so, would fail to take the lesser step, which fairness would seem to dictate, of providing retirees with advance notice that their health insurance coverage would be cancelled. This apparent discrepancy warranted clarification through cross-examination pursuant to Section 102.35(k) of the Board's Rules and Regulations. For, if the Respondent gained no advantage or had no explanation for withholding this latter information, it would be entirely probable that this might have been a vestige of a broader scheme of concealment, which only naturally would embrace a reluctance to disclose that the contract no longer was in place. The cross-examination of Potnick was inspired by his own testimony, in an attempt to probe his credibility in the light of evidence in the record, and his own experience and sensibilities. It was of an extended nature solely in consequence of his evasiveness. In passing, I might note that, later, on cross-examination by General Counsel, Potnick admitted that he had no knowledge as to whether or not employees were ever informed that the contract was not in place.

The refusal request also asserts that the undersigned harbored a bias against the Respondent's counsel as evidenced by certain of my remarks. In each instance, the state-

[38] R. Exh. 4.

[39] Attorney Woody neglected to make these points in letters to District 17 and the International Union, which either had been identified by Potnick, or already was part of the record. R. Exh. 7 and G.C. Exh. 6.

ments were in context of a comprehensive, reasoned response to specious or self-serving arguments he advanced. The first derives from my rejection of his contention that retirees had notice of ultimate termination of their health benefits. In this regard, he had argued that ''they [c]ould determine that if the agreement is no longer in place, then those [health] benefits may no longer be in place.''[40] The second was in the context of my rejection of documents offered by Attorney Woody, which quite obviously were generated by settlement discussions. My response, in that instance, was addressed particularly to Attorney Woody's baseless characterization that the Union's participation in that process ''indicates that the Union believed there was no agreement in place.''

Finally, it is contended that the undersigned expressed ''a great deal of sympathy for retirees.'' Attorney Woody in this connection points to my declared intention to ''retire in four years,'' as evidencing an ''understandable'' bias in favor of retirees, thus, affecting my ''ability to render a fair and impartial decision.'' The equation itself offers a fatuous study. In any event, to the extent that retirees were favored by my rulings, this was an indirect, incidental consequence of my own understanding of generic principles. Thus, my rejection of the General Counsel's request to delete an allegation in their behalf was based upon faulty recollection of the full scope of the Supreme Court's ruling in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971). That interpretation was never challenged by the Respondent, who objected, but on an entirely distinct and uneventful ground. In any event, my faulty construction of the precedent obviously would have been the same irrespective of the category of employees that might have been benefited by the permissive subject of collective bargaining. One might also aver that retirees were favored by an assumption interlaced in my cross-examination of Potnick; namely, that it is unfair to deny employees advance notice that their health insurance will be canceled where the omission is arbitrary, and without advantage to the employer or otherwise explainable. Here again, this assumption rests upon a fundamental truth which has no special relationship to retirees, but applies to all personnel classifications, including managers.

It is with clear conscience that this motion is denied. All issues in this case were decided on the evidence presented. All evidentiary rulings were based entirely on the merits. All questions put to witnesses were born either of a need to clarify or a suggestion in their testimony of a possible breach of the oath. Finally, rulings and critical analysis of all issues were accompanied by candid explication of rationale, focusing always upon counsels' expressed position, not their person. There was neither bias, predilection, nor prejudgment in any sense of those terms.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent rejected the principles of good-faith bargaining and violated Section 8(a)(5) and (1) of the Act by discontinuing fringe benefit contributions and arbitration and rescinding an existing labor contract, without the assent of the exclusive collective-bargaining representative for employees in the following appropriate unit:

> All employees of the Employer engaged in the production of coal, including the removal of overburden and coal waste, preparation of coal, repair and maintenance work normally performed at the mine site, and maintenance of mine roads, and work of the type customarily related to all of the above at the coal lands and coal producing facilities owned or operated by the Employer, excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

First, it shall be recommended that the Respondent be ordered to restore, maintain, and adhere to the 1988 Bituminous Coal Operators Wage Agreement, and any other labor contract entered with the Union as the lawful representative of employees in the appropriate collective-bargaining unit.

Additionally, it shall be recommended that the Respondent be ordered to make whole employees for losses they sustained in consequence of the Respondent's repudiation of the 1988 Wage Agreement and to make whole the UMWA Health and Retirement Funds for moneys unpaid, but due and owing pursuant to the 1988 National Bituminous Coal Wage Agreement. Such sums shall include interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Parenthetically, it is noted that the General Counsel, in her posthearing brief declares that ''the remedial period should run from December 18, 1989, or 6 months preceding the Unions' knowledge.'' I disagree. Such a cutoff is appropriate under the abortive ''continuing violation'' theory,[41] or where there is a historic pattern of ''separate and distinct'' violations,[42] both of which assume a breach, clearly communicated more than 6 months before a charge is filed. However, where the union is kept in the dark so as to excuse an earlier filing, the wrongdoer would sustain a windfall were the remedial period curtailed. ''[S]ince the Union, through no fault of its own, did not discover the violations until [June 18, 1990] due to the Respondent's fraudulent concealment of its actions, the proper remedial order should be retroactive to

[40] As matters turned out, despite his premise, Attorney Woody offered no probative evidence that the retirees, or any other of Respondent's employees, were ever specifically informed that the contract was not in place.

[41] *American Thoro-Clean*, 283 NLRB 1107, 1118–1119 (1987).

[42] *M. J. Santulli Mail Services*, 281 NLRB 1288, 1296, 1298 (1986).

the date Respondent embarked on this unlawful conduct.'' See, e.g., *Pacific Intercom Co*., 255 NLRB 184, 192 (1981).

Finally, it shall be recommended that the Respondent be ordered to waive any time limitations and, if the Union is willing, to process to arbitration any grievance unresolved at the third step of the contractual grievance procedure since September 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[43]

ORDER

The Respondent, Logan County Airport Contractors, Logan County, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing any term or condition of employment set forth in the 1988 National Bituminous Coal Wage Agreement, absent assent of the representative of employees in the following appropriate unit:

> All employees of the Employer engaged in the production of coal, including the removal of overburden and coal waste, preparation of coal, repair and maintenance work normally performed at the mine site, and maintenance of mine roads, and work of the type customarily related to all of the above at the coal lands and coal producing facilities owned or operated by the Employer, excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

(b) Refusing to bargain in good faith by discontinuing benefit contributions and arbitration, or by rescinding an existing labor contract, without the assent of the exclusive collective-bargaining representative for employees in the above-defined unit.

(c) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Restore, maintain, and abide by all lawful terms of the 1988 Bituminous Coal Wage Agreement, or any other collective bargaining entered with the exclusive statutory representative of the employees in the above-described unit.

(b) Make whole the above employees for losses incurred by reason of the abrogation of their collective-bargaining agreement and make whole the UMWA Health and Retirement Funds for moneys unpaid, but due and owing pursuant to the 1988 Bituminous Coal Wage Agreement, with interest, and maintain contributions as required under that agreement.

(c) Process to arbitration, waiving any time limitations, any grievance unresolved at the third step of the contractual grievance procedure since September 1990, if the Union is willing.

(d) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the sums of money due under the terms of this order.

(e) Post at its facilities in Logan County, West Virginia, copies of the attached notice marked ''Appendix.''[44] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT change any term or condition of employment set forth in the 1988 National Bituminous Coal Wage Agreement, absent assent of the representative of employees in the following appropriate unit:

> All employees of the Employer engaged in the production of coal, including the removal of overburden and coal waste, preparation of coal, repair and maintenance work normally performed at the mine site, and maintenance of mine roads, and work of the type customarily related to all of the above at the coal lands and coal producing facilities owned or operated by the Employer, excluding all coal inspectors, weigh bosses at mines where men are paid by the ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith by discontinuing benefit contributions and arbitration and then rescinding an existing labor contract, without the assent of the exclusive collective-bargaining representative for employees in the above-defined unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore, maintain, and abide by all lawful terms of the 1988 Bituminous Coal Wage Agreement, or any other collective-bargaining entered with the exclusive statutory representative of our employees in the above-described unit.

WE WILL make whole the above employees for losses incurred by reason of the abrogation of their collective-bargaining agreement, with interest, and WE WILL reimburse the UMWA Health and Retirement Funds for moneys unpaid, but due and owing pursuant to the 1988 National Bituminous Coal Wage Agreement, with interest.

WE WILL, if the Union is willing, process to arbitration, while waiving any time limitations, any grievance unresolved at the third step of the contractual grievance procedure since September 1990.

LOGAN COUNTY AIRPORT CONTRACTORS